FEDERAL SUPERVISION OF INSURANCE.[1]

Is Congress competent to regulate the conduct of insurance business by corporations in States other than the State of incorporation? Is such business interstate commerce?

If Congress is competent to do this, is it competent also to secure to the corporations the right to do business in the several States regardless of State laws?

If so, can Congress limit the powers of the States in matters of taxation, deposits, examinations, etc.?

It being conceded that great hardships exist at present from the fact that the laws of certain States are burdensome and vexatious, what advantages due to the supersession of state control in whole or in part could be expected under federal control, and what evils might be generated?

These questions are prompted by the movement for federal supervision of insurance inaugurated by important insurance companies, strengthened by the advocates of federal control of all business of national interest, and gaining momentum from a widespread feeling that Congress alone is able to regulate properly the great life companies. The questions do not disclose either hostility or approval. They are animated solely by the spirit of inquiry. Is the grave constitutional question likely to be resolved in favor of federal jurisdiction? If so, how will the new order affect the insurance business generally?

A few great life companies are the most prominent directors of the movement, and it may appear that life companies of enormous size seeking business throughout the world would find in a federal system advantages not enuring in kind or in degree to companies of lesser ambition, or of different business.

If a detailed plan for federal supervision shall be presented it is probable that among the several classes of insurance interests this one and that will suggest modifications and additions to meet peculiarities of its business, and even companies in the same general class may differ in their

[1] This article is an opinion given by the writer, September, 1905, as counsel consulted in behalf of several insurance companies.

views. At present, however, we need not take private diversities and conflicts into account. It will be sufficient to consider the broad meaning of federal supervision. To this end we must first define insurance and outline the system under which it is now conducted, and then discuss the legality and the probable effect of the proposed system.

Insurance is always a contract in respect of a loss of uncertain happening or of uncertain date, and we are not here concerned with the distinction between fire and marine insurance on the one hand where the contract is purely of indemnity,[1] and life insurance on the other, where there is also an obligation to pay a specific sum on an event which is sure to happen sometime.[2]

Insurance originally dealt with perils of the sea, and for centuries was substantially confined to marine risks. To-day we insure against numerous losses—for example, the certainty of death, the hazard of fire and various happenings covered by the broad term casualty insurance. Not only has insurance widened its range of subjects. New incidents have been added,—for example, the income and investment features of life insurance; and the utilization of policies in various transactions is a notable factor in modern business. But however the scope and utility of insurance has expanded, its essence is unchanged. It is always a provision against loss and no additional feature or incidental use will outweigh this primary characteristic.

The business of insurance so commonly calls for associated responsibility that it is not material to determine whether it is really one of those avocations which individuals have a constitutional right to engage in, or whether the state may confine it to corporations.[3] At all events insurance is classed in this country among those fiduciary enterprises over which the government exercises a peculiar supervision.

Association insurance may be roughly divided into two grand classes: Co-operative associations of insurants who contribute for mutual aid, generally in the event of death or illness, and business associations offering insurance of various kinds for gain.

[1] Imp. Fire Ins. Co. *v.* Coos County (1894) 151 U. S. 452, 462.

[2] Washington Central Bank *v.* Hume, (1888) 128 U. S. 195, 205.

[3] See Commonwealth *v.* Vroman (1894) 164 Pa. St. 306.

In the first class are the numerous friendly and benevolent societies. These may well be interested in the proposal for federal supervision, though they are not included in the present scheme. While they are largely differentiated in statute law from business associations they are nevertheless corporations engaged in insurance, and could be regulated under a federal system.

In the second class are all associations organized for profit. These are so generally incorporated that we shall consider insurance as a corporate business. In both stock and mutual companies there is the expectation of reward in the shape of salaries, commissions, etc. In stock companies there is also an expectation of dividends on the capital invested.

The insurance policies in force in the United States, written by business associations, are reckoned in billions of dollars. By far the greater part is written in the States by foreign companies, that is to say, by companies organized in another State or another country, and it is this foreign business which it is proposed to bring under federal jurisdiction, leaving, perforce, each State to regulate the local business of its own companies. In theory of law all this foreign insurance could have been written in a single State, for the Supreme Court has held that a State cannot forbid its citizens to make a contract beyond the jurisdiction for the insurance of risks within it.[1]

Now in certain lines of insurance much business is done by a direct contract between the insured and a foreign corporation without the intervention of a local agent. For example, the marine insurance contract in the Allgeyer case was made in New York between a resident of Louisiana and a New York corporation, and covered merchandise in transit from New Orleans to foreign parts. The bulk of insurance in foreign companies is, however, more conveniently obtained by dealing with local agents, who in their turn enable the company to do a far larger business than would be possible by waiting at home for applications. This natural desire for expansion leads insurance companies to establish agencies in other States and countries, and we will now survey the status and obligations of alien companies

[1] Allgeyer *v.* Louisiana (1897) 165 U. S. 578.

seeking business in the United States and of State companies seeking business in other States.

The United States may exclude alien corporations from every part of the republic, in virtue of their broad jurisdiction over all foreign relations, and, be it noted, without reference to the power to regulate commerce with foreign nations. By the same token the United States can expel alien corporations though these have been formally admitted to particular States. As the power to exclude and expel must include the power to admit, it follows that the United States can admit a foreign corporation to do business throughout the republic without regard to the regulations of the States. In short, as the United States have jurisdiction over the coming and going of alien individuals, they must have equal power in respect of alien corporations, and it is not necessary to discuss here how far this power can be executed by treaty without the support of the House of Representatives evidenced by an act of Congress.

While the Constitution confers upon the United States a far-reaching power in respect of alien corporations the federal statutes and treaties rarely display its exercise. Actually our relations with alien corporations are determined by the several States each acting in its own behalf and in accordance with its own views. A corporation gains admission to a certain State in compliance with its laws and establishes therein its head office for American business. As an alien corporation domiciled in a particular place it thereafter seeks admission to other States whose laws encourage its access.[1]

Permissive local jurisdiction over alien insurance corporations is so fully recognized that the Executive Department has declined to entertain a complaint of unjust discrimination preferred against a State, replying that in the absence of treaty stipulations it had no jurisdiction of the subject, and expressing the opinion that the representatives of the States would not consent to have these corporations regulated by a federal treaty.[2]

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[1] See Nutting *v.* Mass. (1902) 183 U. S. 553; Emp. Liability Co. *v.* Ins. Comm. (1887) 64 Mich. 614.

[2] Foreign Relations, Great Britain, 1899, p. 345.

Domestic corporations are organized under the laws of a State, a Territory, or the District of Columbia, and obtain a charter right to do business within the jurisdiction, but they are not classed with the citizens of a State, who are entitled by the Constitution "to all privileges and immunities of citizens in the several States." Hence, a sister State may deny admission to these artificial beings, or admit them upon condition;[1] and though an association of individuals is not called a corporation in its home, a State may treat it as such where it really comes within the local definition of a corporate body.[2] As the agents of a corporation are a part of it a State may treat them accordingly. A foreign insurance company may be required to employ resident agents, though the effect is to bar citizens of other States from engaging in a particular business open to its own citizens.[3]

Occasionally insurance companies benefit by the rule of comity under which a corporation of one State is enabled to do business in another in the absence of adverse legislation,[4] but, generally speaking, the insurance laws of the several States in regard to foreign companies are so comprehensive as to leave little room for the play of comity.

An insurance company seeks admission to a State for the purpose of doing business therein. Usually this means the establishing of agencies for insuring local risks, but a company maintaining an agency for insuring foreign risks is also doing business in the State subject to its license and control.[5] Until a company has complied with the preliminary requirements it has, generally speaking, acquired no standing whatever in the State. It is a mere outsider negotiating for entrance, and is evidently incompetent to question the propriety or the legality of the State's conditions.

Be it noted that an admitted company seeking a re-

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[1] Bank of Augusta *v.* Earle (1839) 13 Pet. 519.

[2] ee Liverpool Insurance Co. *v.* Mass. (1870) 10 Wall. 566; State *v* Ackerman (1894) 51 Ohio St. 163.

[3] Cook *v.* Howland (1902) 74 Vt. 393.

[4] See U. S. Fidelity, &c., Co. *v.* Lineham (N. H., 1904) 58 At. 956; State *v.* Ætna Life Ins. Co. (1904) 69 Ohio St. 317.

[5] North Am. Ins. Co. *v.* Yates (1905) 214 Ill. 272; Commonwealth *v.* Roswell (1899) 173 Mass. 119.

newal of license is in no better position. A Pennsylvania company doing business in New York under yearly license contended that a demand for three per cent. of the current year's premiums as a license fee for the coming year was unlawful inasmuch as the statute did not fix the fee but made it depend upon legislation in other States. The Court denied the company's standing on the ground that until it had paid the fee it was not within the jurisdiction.[1] The logic of this opinion is impregnable. Understanding that withdrawal from a State will not legally affect any existing contracts, we must concede the State's right to compel the company to choose between discontinuing business and submitting to new exactions.

An insurance company applying for permission to enter a State must show that its capital and objects satisfy the requirements of the local law, file a copy of its charter, designate a resident representative, and generally comply with all preliminary conditions. An insurance company organized in a State is usually required to deposit a certain sum in cash or approved securities, and where it seeks admission to a State from whose own companies a larger deposit is exacted, the latter may reasonably demand a local deposit of the difference, unless this is made up by a deposit in a third locality. An alien corporation may reasonably be required to show somewhere in the United States a deposit equivalent to that exacted from home corporations in case the alien government requires no deposit or one of less amount.

In the above cases the State simply places foreign corporations on a par with its own, but the demand made by a few States for extraordinary deposits from corporations of other States is conspicuously unreasonable. If original deposits were calculated to secure the payment of losses, each company would be obliged to put up a sum bearing a substantial relation to its risks, and each State would properly demand deposits in proportion to local risks. Fortunately deposits need not be thus graded, for the locking up of such enormous capital would make the cost of insurance prohibitive. They are fixed amounts for each company engaged in a particular branch of business. In view of the

[1] Phila. Fire Ins. Co. *v.* N. Y. (1886) 119 U. S. 110.

relative insignificance of deposits to the volume of risks assumed, it is perceived that they are really evidences of good faith rather than of solvency. Where a company has proved its good faith by a satisfactory deposit in the place of incorporation, the exaction of extraordinary deposits by a few States denotes a stupid and selfish policy which, if general, would narrow the field of insurance everywhere by greatly increasing the cost. At first blush the refusal of a State to admit an alien company until it has made therein or in some other State a deposit larger than is required from domestic companies may seem a prudent exaction from an alien body, but bearing in mind the real theory of deposits, the discrimination appears unreasonable.

Where an applying company truly conforms to the entrance conditions it is the duty of the insurance commissioner to issue a proper license, and he may be compelled to do so.[1]

A licensed insurance company is ready for business, and during the term of the license is a domiciled person, subject to the State's laws, and entitled to whatever protection the constitutional guarantees confer.

Insurance legislation in the United States includes forty-six sets of State statutes, and every company doing an extensive business subjects itself to many, some companies to all of them. It is not necessary to review this large body of statute law. It will be sufficient to call attention to the heavy pecuniary requisitions made by the combined States, and to indicate the embarrassments which the discriminations and diversities of this multiple code and the enforcement of its rules inflict upon the foreign insurance companies.

The business of insurance is taxed by the States in various ways and at various rates, and, without discussing the broad question whether insurance is a proper subject of taxation, it is evident that in certain States the taxes are conspicuously burdensome. Besides taxes, insurance companies pay to the States annually a large sum on account of supervision, but when the cost of supervision is deducted

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[1] People *v.* Van Cleve (1899) 183 Ill. 330; Mutual Life Ins. Co. *v.* Boyle (1897) 82 Fed. 705; Bankers Life Ins. Co. *v.* Howland (1900) 73 Vt. 1.

there remains a great revenue, estimated for 1899 at over $4,000,000.[1]

So far as a State imposes identical rules upon domestic and foreign insurance interests, the foreign company has no peculiar legal reasons for complaint. Nor can it enjoin that plausible but frequently unintelligent discrimination widely illustrated in retaliatory and reciprocity laws whereby a State regulates its attitude towards the companies of its neighbors by the treatment which these accord to its own.

Invidious discrimination is altogether indefensible in any form, and is especially obnoxious in the shape of extra deposits, fees and taxes. The real extent of invidious discrimination against foreign companies is not measured by the statutory texts. In most States local insurance enterprises are for one reason or another wholly inadequate to meet local needs. Hence the insurance laws of these States in fact affect foreign companies largely, in some cases almost entirely. For this reason they are too often disfigured by drastic and whimsical regulations less likely to be adopted were important local companies concerned.

The principles of insurance should be identical in all the States, yet we find diversities touching the very heart of the contract. There is no good reason why insurance administration should not be substantially uniform, yet we find a great variety of requirements in matters of form and routine, compelling companies to conduct and report their business in various ways in order to conform to what are often trivial differences.

In the actual supervision of insurance the legislature on rare occasions exercises its powers of inquisition. Occasionally the courts are invoked to discipline a delinquent company. Usually, however, the supervision of the companies and the enforcement of the laws are performed by forty-six State insurance commissioners. While there are matters which a legislature cannot delegate to an administrative officer—for example, the making of a standard policy,[2] the courts, mindful that legislatures cannot actually

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[1] See Spectator, Nov. 1, 1900

[2] Anderson *v.* Manchester Fire Ins. Co. (1894) 59 Minn. 182; O'Neil *v.* Ins. Co. 1895) 166 Pa. 72.

regulate the conduct of corporations, justify them in promulgating broad principles of conduct and investing officials with large discretionary powers in the matter of application.

In addition to making stated reports, an insurance company is subject to examination by the commissioner at his will and its expense. A commissioner is frequently authorized to revoke the license of a company for failure to comply with his orders or requirements. This means expulsion from the State so far as getting new business is concerned, though of course the existing contracts of an expelled company are not disturbed, and until these are terminated the local relations of the company are not completely severed. An order of revocation is generally subject to judicial review, and, occasionally, is adjudged illegal, but the procedure is usually valid and imports a large personal control over the foreign corporation. The power of a commissioner to compel compliance with his orders under threat of expulsion is one of vast influence, and, as a rule, submission to all but the most conspicuously unreasonable exactions seems to be preferred to a contest. The large measure of discretion generally conferred upon these officials makes the administration of the office depend upon the personality of the incumbent and too often subjects the business to an objectionable control.

We have seen that until an insurance company is admitted to a State it cannot question the constitutionality of the State's regulations, though it must be understood that where the company really conforms to the statutory conditions a commissioner cannot deny admission.

A company admitted is clearly in a position to demand its constitutional rights. Indeed it is not bound by accepting entrance conditions purporting to abridge them. Thus a foreign company may remove a suit from a state to a federal court, though it had been admitted upon the condition that it would not remove.[1] But it has been held that where a company exercises its right of removal the State may expel it for breach of agreement.[2] The ruling in the Doyle case provoked a strong dissenting opinion, and

[1] Ins. Co. *v.* Morse (1874) 20 Wall. 445. See also So. Pac. Co., *v.* Denton (1892) 146 U. S. 202, 207.

[2] Doyle *v.* Ins. Co. (1876) 94 U. S. 535.

there is some reason to expect its modification.[1] It is at odds with the principle that a State cannot discipline a person for exercising a right guaranteed by the Constitution of the United States.[2]

Ordinarily a license is not a contract and its conditions can be varied without a breach of the Fifth Amendment.[3]

The equal protection of the laws guaranteed by the Fourteenth Amendment does not require like rules for all branches of insurance.[4] Hence a State may impose twelve per cent. damages and attorney's fees upon life and health companies failing to pay losses within a specified time, without placing like burdens upon fire and marine companies or on lodges and benevolent associations.[5]

Anti-trust legislation has, in several States, raised constitutional questions of interest to certain insurance companies. While these companies have profited by decisions invalidating anti-trust statutes for exempting a particular class from their operations,[6] their rate agreements have been condemned here and there under valid laws.

Reviewing the constitutional status of foreign insurance companies we find that whatever property they acquire is protected by all the property guarantees. But their property interest is comparatively small. Their main interest is in carrying on a business which needs little property to conduct it and creates none in its working, a business including few vested rights of value. Admitted to a State by grace, accorded a term brief in time and somewhat precarious in tenure, an insurance company is seldom able to better its foreign business by invoking constitutional guarantees.

I have briefly reviewed the present system of insurance regulation and I find that in certain States legitimate business is penalized by the enormous requisitions on account

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[1] See Cable *v.* U. S. Life Ins. Co. (1903) 191 U. S. 288.

[2] See Barron *v.* Burnside (1887) 121 U. S. 186, 194; Blake *v.* McClung (1898) 172 U. S. 239, 255.

[3] Home Ins. Co. *v.* Augusta (1876) 93 U. S. 116; Conn. Mutual Life Ins. Co. *v.* Spratley (1899) 172 U. S. 602.

[4] Orient Ins. Co. *v.* Daggs (1869) 172 U. S. 557.

[5] Fidelity Ins. Co. *v.* Mettler (1902) 185 U. S. 308. See also Farmers Ins. Co. *v.* Dobney (1903) 189 U. S. 301.

[6] Niagara Fire Ins. Co. *v.* Cornell (1901) 110 Fed. 816.

of supervision, by unjust discriminations against foreign companies in the shape of extra deposits, taxes and fees, and by subjection to a variegated assortment of officials. And I find that the very system of multiple State control begets a diversity of principles and methods, a duplication of requirements and a multiplication of dealings with officials which embarrass the conduct of business generally.

In some States these conditions deprive the communities of insurance facilities commensurate with their real needs. Generally, they operate to increase the cost of doing business, and a substantial part of this increase is written into the insurance rates. Insurance companies have a strong *prima facie* reason for wishing to substitute for the complex state system, the simpler system of federal regulation, but they are bound to inquire whether this can be lawfully accomplished, and, if so, whether the new conditions will on the whole be more advantageous than the old.

Is Congress competent to regulate the business of insurance as conducted by alien companies throughout the Union, and by domestic companies beyond the boundaries of the incorporating State?

The Federal Government might, as I have pointed out, regulate alien insurance companies in virtue of its broad jurisdiction over all foreign regulations. But the present plan involves the regulation of both alien and domestic companies and needs the backing of a federal power equally applicable to each class.

Federal jurisdiction over national banks will not cover insurance. These institutions are not founded upon a general power to create corporations, or upon the commerce clause. They are creatures of the fiscal power.[1] They are government instrumentalities[2] confided to private parties, who are further encouraged to organize them by the permission to add certain profitable incidents of ordinary banking business.

Warrant for federal regulation of insurance must be sought in the clause empowering Congress to regulate "commerce among the several States," and if this be found,

[1] See McCulloch *v.* Maryland (1819) 4 Wheat. 316, 422.

[2] See Farmers Nat. Bank *v.* Dearing (1875) 91 U. S. 29, 33.

the clause will cover also insurance "with foreign nations." Here we are confronted by opinions of the Supreme Court that insurance is not interstate commerce. Since the present movement for federal supervision requires the reversal of these opinions we must examine them carefully.

In the leading case of Paul *v.* Virginia (1868)[1] the Supreme Court upheld a Virginia law which forbade any person to act as agent for a foreign insurance company failing to make a deposit in the State, and therefore lacking a license to do business therein. Insurance interests have twice invoked the Court to reverse the principle of Paul *v.* Virginia,[2] and have never ceased from criticising this passage in the opinion:

> "These [insurance] contracts are not articles of commerce in any sense of the word. They are not subjects of sale and barter, offered in the market as something having an existence and value independent of the parties to them. They are not commodities to be shipped or forwarded from one State to another, and then put up for sale. They are like other personal contracts between parties which are completed by their signature and the transfer of the consideration. Such contracts are not interstate transactions though the parties may be domiciled in different States."[3]

Mr. Justice Field, who delivered the unanimous opinion of the Court, is charged with obtruding partisan views of State rights in a *dictum*. As to his political views it is only necessary to say that here they were shared by the entire Court. The passage is not a *dictum*. It contains the very gist of the decision, for if the insurance transaction in question were inter-state commerce, the State could not have required the company to obtain a license. Furthermore the passage has served as the basis for two later decisions.[4] In the Cravens case the Court said, referring to the Hooper case:

> "We * * * will only repeat, 'the business of insurance is not commerce. The control of insurance is not commerce. The making of such a contract is a mere incident of commercial intercourse, and in this respect

[1] 8 Wall. 168.

[2] Hooper *v.* California (1895) 155 U. S. 648; N. Y. Life Ins. Co. *v.* Cravens (1900) 178 U. S. 389.

[3] 8 Wall. 183.

[4] Hooper *v.* California (1895) 155 U. S. 648; N. Y. Life Ins. Co. *v.* Cravens (1900) 178 U. S. 389. See also Nutting *v.* Mass. (1902) 183 U. S. 553; Phila. Fire Ins. Co. *v.* N. Y. (1886) 119 U. S. 110, 119; Williams *v.* Fears (1900) 179 U. S. 270, 277.

there is no difference whatever between insurance against fire and insurance against perils of the sea.' And we add, against the uncertainties of man's mortality."

A view of these insurance cases highly favored by lay advocates of federal supervision, and I regret to say not lacking a certain toleration among lawyers pressing the new proposal, is that the Supreme Court will see a new light if Congress shall expressly assert jurisdiction over the insurance business. Laymen bluntly declare that if Congress shall assert jurisdiction it is not for the Court to deny it.

Lawyers insinuate that as the decisions were based upon State laws they operate to delimit the jurisdiction of Congress by indirection, whereas this jurisdiction should be deemed definitely passed upon only in cases where it is affirmatively claimed. Recalling that the body of State rights thus far affirmed by the Supreme Court has been largely defined in cases involving State laws we perceive that the insinuation not only tends to unsettle the foundations of State jurisdiction, but strikes at the authority of the Court by its implication that whenever Congress speaks the Court must bow.

This implication is suggested in the Dryden Bill wherein Congress would assume to regulate "interstate commerce insurance" as if to challenge the Court to set aside its definition. If the Court should be confronted by an act imposing an "indirect income tax" must it ignore its decision that an income tax is a direct tax within the meaning of the Constitution? In the same vein the Dryden Bill recites that "policies of insurance are hereby deemed to be articles of commerce and instrumentalities thereof" relying perhaps upon declarations of the Supreme Court that it will not deny commercial qualities to commodities recognized by Congress as possessing them.[1] These declarations merely suggest that the Court will not affirm a State's right to outlaw commodities which Congress deals with as conventional subjects of trade—for example, liquor and oleomargarine. They do not imply a right in Congress to force a legal definition of commodities upon the Court.

Every act of Congress is entitled to the most respectful

[1] See Leisy *v.* Hardin (1890) 135 U. S. 100, 125; Schollenberger *v.* Pa. (1898) 171 U. S. 1, 8.

consideration, and a series of unchallenged acts goes far to affirm a jurisdiction which the Court will rarely deny; but it has never accepted a claim of Congress as conclusive evidence of federal power; and it has declined to accept a State legislature's definition of its own powers.[1] I am well persuaded that the Court will not take its definitions of constitutional law from federal statutes, or reverse its opinions at the demand of Congress.

The twice affirmed rule in Paul *v.* Virginia ranks on its face among the well settled doctrines of constitutional law announced by the Supreme Court. The rule is only impeachable by proof of radical defect in reasoning. The only objections worth considering are those that attack its foundations.

It is contended that Paul *v.* Virginia was decided under a misconception of the real nature of the modern insurance business. We are told that whatever insurance may have been in the past it has developed into an integral part of commerce. This is misinformation,—almost misrepresentation. No modern development of the business is so intimately connected with commerce as marine underwriting, the most ancient of all insurance. If the Court has failed to perceive the true relation of insurance to commerce, persistent and inexcusable ignorance must be attributed to most of the judges on the bench between 1869 and 1902, in order to account for its successive decisions.

Has the Court really so mistaken the nature of insurance as to render these decisions unstable?

Insurance is a contract. "Commerce" among the States is, in the broadest sense, "intercourse." Intercourse here means the movement of somebody or something—as tangible as lumber, as intangible as a wireless message. A contract cannot in itself be commerce in this sense. It is essentially an agreement. To say that an agreement is made "among" the States would be nonsense. Every contract is assumed to have been made in a certain place, and parties have a very large liberty in choosing the place of personal contracts. While there is often a question whether an agreement is made in one State or another, or

[1] See People *v.* Compagnie Générale Transatlantique (1882) 107 U. S. 59.

in one country or another, it cannot be made among two States or countries. These general principles are amply illustrated in insurance contracts.

Although a contract is not interstate commerce in itself, it may involve this commerce where movement from State to State enters into the consideration,[1] but, generally, the movement of persons or things from one State to another is no part of the consideration of an insurance contract. Insurance on a life, or a house, or a boiler, is not taken or assumed for any purpose of interstate commerce.

There is, however, a large amount of what may be called "ambulatory insurance" essential to the interstate movement of property, and illustrated by insurance on vessels and goods passing from State to State. Without attempting to distinguish the contract here from other insurance contracts by calling it an instrumentality of interstate commerce within the purview of federal regulation, it is not unreasonable to argue that the insurance of vessels and goods is so necessary to interstate transportation as to render State regulations distinctly hampering it unlawful restraints on commerce. Perhaps the Supreme Court had this possible case in mind when it said in Nutting *v.* Massachusetts:

> "A State has the undoubted power to prohibit foreign insurance companies from making contracts of insurance, marine or other, within its limits, except on such conditions as the State may prescribe, not interfering with interstate commerce."[2]

It is frequently argued that the national importance of insurance, various functions performed by insurance, various undertakings of insurance companies and transactions incident to the making and performance of the contract draw the business within the jurisdiction of Congress. Insurance is unquestionably of the broadest social interest, but this does not suffice to bring it within the scope of national regulation, else marriage and all family relations would long since have been regulated by Congress. Insurance bears a most important relation to the general business of the country, but the Supreme Court has repeatedly de-

[1]See Addyston Pipe Co. *v.* U. S. (1899) 175 U. S. 211.

[2](1902) 183 U. S. 556.

clared that interstate commerce does not comprise transactions incidentally relating to intercourse among the States.[1]

When great life insurance companies point to their peculiar contracts, their varied affiliations and the far reaching influence of their vast accumulations as evidence of their activity in the commerce of the country they first provoke the reply that the actual position of a few life companies cannot affect the legal status of all insurance interests, and then draw attention to the irrelevancy of their claims. An insurance company is not an investment concern because it issues bonds, annuities and deferred dividend policies; not a savings bank because it gathers in savings; not a national bank or a trust, railroad or industrial company because of its financial relations to these enterprises. Whatever engagements are made beyond the contract of insurance, whatever relations with other business accrue through necessity or policy are incidents. This or that incident may in itself be of federal concern, but none will draw the main business within federal jurisdiction. The company remains in the eye of the law an insurance corporation.

Where the parties to an insurance contract reside in different States there is usually an interstate transmission of documents, money, etc. Here, if anywhere, will be found the conditions that go to make a transaction interstate commerce in the constitutional sense. Where a risk in Wisconsin is assumed by the agent of a New York company the policy may be forwarded from New York; premiums paid in Wisconsin find their way to New York; in case of loss the indemnity moves from New York to Wisconsin. Each of these acts involves interstate communication. No State can prevent them. Indeed, they are largely performed through the United States mail. To this extent they are protected by federal law, but the question remains whether the combination of acts or any act alone serves to bring the insurance business within the regulative power of Congress, and this seems to be generally narrowed down to the transmission of the policy of insurance. At any rate this action will serve as a test.

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[1]See Nathan *v.* Louisiana (1850) 8 How. 73; Hopkins *v.* U. S. (1898) 171 U. S. 578; Anderson *v.* U. S. (1898) 171 U.S. 604; Williams *v.* Fears (1900) 179 U. S. 270.

The Supreme Court holds that interstate commerce includes the purchase, sale and exchange of commodities;[1] and it has lately defined lottery tickets as articles of commerce, and decided that the forwarding of these from one State to another is a transaction within federal jurisdiction.[2]

The reasoning of the Court in the lottery case is said to apply equally to lottery tickets and insurance policies, and therefore to open the way to reconsideration of Paul *v.* Virginia. The dissenting judges in the Lottery case found, indeed, a sufficient resemblance between a ticket and a policy to bring the former within the rule of Paul *v.* Virginia, saying:

> "The lottery ticket purports to create contractual relations and to furnish the means of enforcing a contract right. This is true of insurance policies and both are contingent in their nature."[3]

But while the Court did not refer to the insurance cases its definition of a ticket differs essentially from its definition of a policy in those cases. It says the lottery tickets "were the subject of traffic; they could have been sold; and the holder was assured that the Company would pay to him the amount of the prize drawn . . . Even if a holder did not draw a prize, the tickets, before the drawing, had a money value in the market among those who chose to sell or buy lottery tickets. . . . We are of opinion that lottery tickets are subjects of traffic and therefore are subjects of commerce."[4] In Paul *v.* Virginia the Court said:

> "These [insurance] contracts are not articles of commerce in any sense of the word. They are not subjects of sale and barter, offered in the market as something having an existence and value independent of the parties to them. They are not commodities to be shipped or forwarded from one State to another, and then put up for sale. They are like other personal contracts between parties which are completed by their signature and the transfer of the consideration. Such contracts are not interstate transactions, though the parties may be domiciled in different States."[5]

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[1]Addyston Pipe Co. *v.* U. S. (1899) 175 U. S. 211; Swift *v.* U. S. (1905) 196 U. S. 375.

[2]Champion *v.* Ames (1903) 188 U. S. 321. [3](1903) 188 U. S., 367.

[4](1903) 188 U. S. 353-4. [5](1868) 8 Wall. 183.

The range of the lottery decision has been much discussed. In my opinion both its definition of commerce and its doctrine of prohibition are of little or no general value. The delicate mechanism of the majority opinion is devised to suppress an unwholesome game. Would not the majority judges resent the imputation that in affirming the right of Congress to stop a lottery ticket they had denied the right of the States to regulate a vast business hitherto within their jurisdiction? And in defining tickets as articles of commerce have they impliedly affirmed the right of Congress to supervise the lottery business and force the tickets upon unwilling States?

There is no merit in the suggestion that the Court has expanded the definition of articles of commerce in Paul *v.* Virginia so as to include such intangibles as telegraph and telephone messages, and, therefore, cannot logically exclude insurance matter from this category. The message is not an article in transit. It is commerce itself. Its very purpose is interstate communication; but this is not the purpose of an insurance transaction.

A ruling that foreign insurance can be regulated by Congress because it involves incidental communication between States could hardly fail to warrant federal regulation of all the large business of the country, and the multitude of small transactions between citizens of different States.

This ruling would obliterate a line between the commercial jurisdictions of the United States and the States which the Supreme Court has always endeavored to maintain. In Hooper *v.* California[1] the Court marks "the difference between interstate commerce or an instrumentality thereof on one side and the mere incidents which may attend the carrying on of such commerce on the 'other." And it says:

> "This distinction has always been carefully observed, and is clearly defined by the authorities cited. If the power to regulate interstate commerce applied to all the incidents to which said commerce might give rise and to all contracts which might be made in the course of its transaction, that power would embrace the entire sphere of mercantile activity in any way connected with trade between the States; and would

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[1] (1895) 155 U. S. 655.

exclude State control over many contracts purely domestic in their nature."

I am strongly of the opinion that the Supreme Court will sustain the rule in Paul *v.* Virginia; yet there is a possibility of reversal and the proposal for federal supervision is sufficiently advanced to warrant consideration on the merits.

First, however, I would commend a change in strategy. Congress should not be pressed to enact insurance regulations until the Supreme Court shall have affirmed its jurisdiction. Even if an act could be passed I am sure it would add no weight to an argument before the court; and I think congressmen are not likely to demand a reconstruction of constitutional law that will deprive their communities of revenue rights of enormous value. Moreover a federal statute purporting to supersede the State laws now governing foreign insurance, yet presumptively invalid because in present contempt of judicial decisions, might beget conflicts of authority and uncertainties in business during the period which must elapse before the Supreme Court could determine whether contempt should be cast upon the new statute or upon the old decisions.

While a comprehensive bill might properly be prepared in order to discover the full bearings of federal supervision, the question of jurisdiction should be determined in a suit by a State against a foreign company refusing to submit to its regulations.

Assuming that jurisdiction of insurance is attributed to Congress, let us consider first the legal consequences of the change of base irrespective of new federal legislation.

The change of base would automatically subject insurance to whatever federal statutes apply to interstate commerce generally. The Anti-Trust Act seems to be the one of special concern, and this only to insurance interests working under rate agreements or understandings. Non-competitive rate making is attacked and defended by familiar arguments not necessary to recite, and while certain States have enacted prohibitory laws of more or less efficiency, the practice seems to be widely maintained. Under the Anti-Trust Act this practice will be outlawed

everywhere, and judicial interpretations of the act indicate a very broad condemnation of non-competitive conditions even where no actual agreement is proved.[1]

The change of base would automatically free the insurance business from many burdensome State regulations. The rule forbidding States to hamper interstate commerce would paralyze the whole body of State laws relating to the admission and expulsion of foreign insurance companies, and all laws expressly discriminating against them.

If the Supreme Court should declare insurance to be interstate commerce before Congress had passed a regulating act certain State regulations, not restrictive, would probably remain in force under the familiar rule permitting States to legislate on interstate commerce matters not essentially national until Congress shall take jurisdiction. But as Congress would quickly cover the field we need not consider the range of State activity during the interval.

A very important question is whether or how far the States could continue to collect from foreign companies the millions of dollars now received yearly in the shape of supervision charges, fees and taxes.

The withdrawal of State supervision will, of course, withdraw these charges; and all license fees will fail, for interstate commerce cannot be subjected to a privilege tax.[2] A State will retain power to tax a company's real and personal property within its jurisdiction at equal rates with like property,[3] but this tax is comparatively unimportant.

The chief interest centers upon taxes on the business of insurance, commonly imposed on the premium receipts. How will these premium taxes fare under the broad rules laid down by the Supreme Court? Where a corporation is engaged in both interstate and local business, as is the case with railroad, express and telegraph companies, a State is entitled to segregate and tax the latter.[4] But "where by way of duties laid on the transportation of the subjects of

[1] See Northern Securities Case (1904) 193 U. S. 197; Swift *v.* U. S. (1905) 196 U. S. 375.

[2] See Brennan *v.* Titusville (1894) 153 U. S. 289.

[3] See Cleveland, &c., Ry. *v.* Backus (1894) 154 U. S. 439, 445; Atlantic Tel. Co. *v.* Phila. (1903) 190 U. S. 160.

[4] See Osborne *v.* Fla. (1897) 164 U. S. 650.

interstate commerce, or on the rcceipts derived therefrom, or on the occupation or business of carrying it on, a tax is levied by a State on interstate commerce, such taxation amounts to a regulation of such commerce and cannot be sustained."[1] For example, a State cannot tax fares and freights received for interstate transportation.[2]

A prominent advocate of federal supervision seems to concede a State's right, under the new system, to tax the local receipts of foreign insurance companies at equal rates with those of local companies, but as the whole theory of supervision is based upon the definition of foreign insurance business as interstate commerce, I cannot reconcile the concession with the broad rulings of the Supreme Court. When railway receipts from interstate business are exempt, how can insurance receipts be taxed? Possibly ingenuity may devise a valid scheme for extracting State revenue from foreign insurance under the new system, but I see no room for a State right to tax premium receipts.

Surveying State budgets under the new system, it seems that a very large part of the revenue from foreign insurance will be cut off to the immediate gain of the companies. Whether, or how far the gain will be maintained depends on the incidence of federal taxes, and on the possibility of State taxation by leave of Congress. The anticipated curtailment of State revenues may prove an additional obstacle to the reversal of Paul *v.* Virginia and sequent decisions. The doctrine of *stare decisis* derives great strength here from the fact that many State revenue systems are partly based on these repeated opinions of the Supreme Court. To reverse them would unsettle systems long maintained in reliance upon their stability.

While the principal relations between the States and foreign companies will be broken, minor relations will remain. The companies will continue to own property in the States, and, though their business be primarily interstate commerce, its conduct will constantly involve local dealings subject to local regulation. In all these matters the companies will be entitled to a State's protection, and must in return obey its rules.

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[1] Postal Tel. Co. *v.* Adams (1895) 155 U. S. 688, 695.

[2] Fargo *v.* Michigan (1887) 121 U. S. 230; Phila. S. S. Co. *v.* Pa. (1887) 122 U. S. 326, 336.

Federal supervision would immediately deplete the States of such large powers that it is worth while to inquire whether or how far their representatives in Congress could expressly confer upon them, by way of privilege, a jurisdiction which they could no longer exercise of right.

The States could not plausibly request jurisdiction that would impair the cardinal virtues of simplicity and uniformity which so commend federal supervision. But we must anticipate a strong effort to retain a substantial portion of the revenues now derived from insurance. If Congress shall not tax insurance the States will contend that it should not be exempt altogether. If federal taxes are imposed, they will complain that revenues are transferred from state to federal account.

Advocates of federal control of corporations generally, realizing the consequent shrinkage of State incomes, have suggested that Congress make good the loss by collecting revenue for distribution among the States, but I mention this suggestion only to discredit it. Any fair and practicable method of maintaining State insurance revenues under the new system must be operated by the States themselves acting under a federal concession. Whether this can be lawfully granted presents a novel and delicate question.

It goes without saying that Congress cannot transfer to the States its commercial, or any other powers. But the Supreme Court has affirmed its powers to concede to the States special, and of course repealable, privileges to regulate certain interstate commerce matters normally beyond their jurisdiction.

In Rahrer's Case[1] the Court upheld an act of Congress permitting a State to forbid the sale of imported packages of liquor, a transaction formerly beyond its prohibitive power.[2] Here is a clear example of State legislation validated by the grace of Congress.

In Rahrer's Case a State was allowed to forbid an interstate commerce transaction altogether. If under the new system Congress should waive objections to the levy of a uniform and limited State tax on foreign insurance, would this be inconsistent with the principle of Rahrer's Case?

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[1](1891) 140 U. S. 545. See also Schollenberger *v.* Pa. (1898) 171 U. S. 1.

[2]See Leisy *v.* Hardin (1890) 135 U. S. 100.

While the States have no constitutional right to tax national banks,[1] Congress has expressly conceded certain privileges in this regard,[2] and this practice is likely to be urged as a precedent for federal concession in the matter of insurance taxes.

I am inclined to think a way might be found to allow State taxation of foreign insurance. Certainly there is a possibility to be reckoned with. The imposition of insurance taxes by Congress will be no legal impediment. Double taxation is not forbidden by our constitutional law. And the imposition of federal and state taxes on the same subject is by no means unknown. "Under our constitutional system," says the Supreme Court, "both the National and State governments, moving in their respective orbits, have a common authority to tax many and diverse objects, but this does not cause the exercise of its lawful attributes by one to be a curtailment of the powers of government of the other, for if it did there would practically be an end of the dual system of government which the Constitution established."[3]

Still assuming that Congress will take jurisdiction of foreign insurance we proceed to inquire into the method of regulation. The most prominent scheme of federal supervision is contained in a bill introduced by Senator Dryden in the last session of Congress. This bill defines policies of insurance as "articles of commerce and instrumentalities thereof" and "such contracts of insurance and transactions thereunder as may be made or carried out by a corporation with the insured in a State, District, Territory or foreign nation other than that of the locality of the insured," as "interstate commerce insurance."

It creates a division of insurance in the Bureau of Corporations. Every state company wishing to do business elsewhere must file with the superintendent of insurance copies of its charter and by-laws, a statement of its financial condition, etc., and shall deposit $100,000 security unless the superintendent shall accept a certificate that $100,000 has

[1] McCulloch *v.* Maryland (1819) 4 Wheat. 316.

[2] See Owensborough Nat. Bank *v.* Owensborough (1899) 173 U. S. 664, 668.

[3] Knowlton *v.* Moore (1900) 178 U. S. 41, 60.

been deposited in the State of incorporation. Every alien company shall deposit at least a like amount, and if its government exacts a larger amount from American companies this shall be required here.

If the superintendent shall be satisfied of the company's solvency he shall issue a license enabling it to do business throughout the United States, excepting, of course, the home territory of a state company. The licensed company is required to make reports to the Bureau and submit to its examinations.

As the Dryden bill was introduced to launch a novel project for discussion, rather than to commend a matured and comprehensive working plan it would be unfair to subject it to a critical examination, and I shall consider the principles and practice of federal supervision in a general way.

In point of law a federal insurance act will impose no legal duty upon State companies. Each will retain its charter and its home field of operations. The act will be simply proffered for acceptance. But in fact the pressure for acceptance will be imperative upon most companies of extensive business, since the penalty for rejection is confinement to the home field, and we may expect large alterations in state charters to align them with federal requirements.

At present a State corporation cannot do business in another State without the latter's license. The cardinal feature of the proposed insurance system is that no State company can do business beyond its home without a federal license, and this will enable it to do business anywhere in the republic.

The present system rests upon a well-established basis. The proposed system involves a most serious question of constitutional law—whether the power of Congress to regulate commerce among the States includes the right to prohibit it. The bald question is whether Congress can forbid a State corporation, and if a corporation also an individual, to hold business intercourse with another State. The Lottery Case[1] is cited in support of this prohibition, but as I found its definition of a lottery ticket as an article of commerce inapplicable to an insurance policy, so I find its at-

[1] (1903) 188 U. S. 321.

tribution of prohibitive power over the lottery game equally inapplicable to the insurance business.

However, as I did not clip this inquiry with my personal opinion that insurance will not be called interstate commerce, I will not end it at this stage with my opinion that Congress is powerless to prescribe the federal license which is the basis of the proposed system. I shall assume the validity of the license in order to continue my examination of the new system on its merits.

Federal insurance legislation will be a regulation of commerce within the rule of uniformity. This requires a commerce law to be operative throughout the Union, but it does not necessarily forbid Congress to make a reasonable classification of subjects. Certain classes may be entirely exempted from the operation of a law, and reasonably different rules may be prescribed for those included.

Applying the principle of classification to our subject we find that Congress will not be legally bound to regulate all branches of insurance. Yet the actual regulation of all must be expected, for if Congress should enact a law for a single branch—say life insurance—the validation of its principle as a regulation of interstate commerce would bring large lines of fire, marine and casualty insurance within the definition of this commerce, and immediately free them from the greater part of state regulation without substituting a corresponding federal control. Whether supervision would be extended to fraternal societies of national activity remains to be seen.

Upon the whole, the rule of uniformity will not seriously embarrass the preparation of a comprehensive scheme of federal supervision, according due consideration to each branch of insurance, though here and there it may work hardship.

Congress may be expected to deal with the form and effect of insurance contracts, including standard policies; with the deposit of funds; with reports and examinations; and to establish corporate and financial standards for all organizations doing business within the federal jurisdiction, etc., etc. In fine, it will enact an insurance code, and create a department for supervising the conduct of business. Congress will not impose direct taxes on insurance, for, as

these must be apportioned among the States according to their respective populations, none is levied. Indirect taxation is the ruling method of raising federal revenues.

An insurance revenue law may contain several items, but a license fee might prove to be so flexible and adequate as to exclude other exactions. The imposition of a license fee might raise the question whether it is to be treated as a regular tax, or as simply a condition precedent to engaging in interstate commerce, and therefore a mere regulation thereof. If the fee is simply a regulation of commerce the governing rule of uniformity is derived by implication, and is, perhaps, more flexible than if it were expressly prescribed by the Constitution. If, however, the fee is a tax, it is one of those taxes which by the very words of the Constitution "shall be uniform throughout the United States." Yet even this express rule permits reasonable exemptions and classifications.[1]

Applying the principle of classification to the license fees of insurance companies, we may fairly contemplate the graduation of fees according to the kind of insurance, the nature of the companies, and even according to the volume of business, thus making it possible to discourage the overgrowth of corporations by progressive taxes. Whether the new system would increase or diminish the incidence of insurance taxes remains to be seen, but the companies should by no means take for granted the lightening of their burdens. Federal expenditures are increasing enormously. Congress is handicapped by its inability to levy direct taxes, including income taxes. Corporations are the most popular subjects of taxation, whatever their business.

Perhaps the companies pressing for federal control hope that the States assembled will adopt a more liberal policy than is generally followed by the States separately. Perhaps the hope may be realized. It cannot be taken for granted, however, that Congress will fail to utilize a new source of revenue.

Federal supervision would abolish immediately State rights of admission, expulsion and discrimination, a multiple code of laws, State deposits, supervision charges, and, apparently, taxes on business. Federal supervision would

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See Knowlton *v.* Moore (1900) 170 U. S. 41.

establish a single code and a single control. It should be remarked that while there would still be opportunity for invidious discrimination against alien companies, the bringing of these within the normal sphere of international relations would give their governments opportunity to protest against injustice. Furthermore, instead of obtaining a domicile in a certain State by its leave and then seeking admission to other States, they would enter the republic by federal consent, and be subject to but one set of regulations.

Turning from these notable benefits to the other side of the account we find no inevitable disadvantage, except to those insurance interests whose rate arrangements would be condemned by the Anti-Trust Act. But taking probabilities and even possibilities into account, as we must, the new system does not promise so large a balance in favor of all insurance interests as to make a judicial declaration of its illegality, which I anticipate, an unmixed misfortune.

In the first place there will be federal taxes without assurance of immunity from State exactions, and it is impossible to prefigure the incidence of the double burden. In the second place the spirit of federal supervision is quite as uncertain as are its details.

There is an impression that the national body politic represented in Congress is superior to the local bodies represented in State legislatures. But if a comparison between Congress and State legislatures seems to suggest that the whole is better than the parts, is this not due largely to the comparative freedom of Congress from influences to which the new system would subject it, and to lack of opportunities which the new system would confer? If the regulation of great corporations be largely transferred to Washington, and, I repeat, federal supervision of insurance is likely to stand or fall with the proposal to centralize the control of all business of national importance, might not the Federal Government suffer from that close contact with business which disfigures too many of our State legislatures, here leading to corrupt influence, there to unwarrantable interference?

At present the insurance companies do an enormous business, subject to peculiar hardships, it is true, yet, on the whole, fairly profitable. Seriously embarrassed in certain

States, others afford them enough hospitality to create a large field for business. Paul *v.* Virginia cannot be said to have stifled a business which has grown to such vast proportions since 1869. The companies now are able at least to seek business beyond their incorporating States, and find enough to encourage their excursions. Under the new system no company could leave its State without the permission of Congress, and subject to such conditions as Congress might choose to impose.

I believe Congress is incompetent to regulate insurance; I question whether all insurance interests would be greatly promoted under national control. But the present working of multiple State control breeds evils so serious that even their mitigation will amply repay a concerted effort by insurance interests, for which the time seems opportune. The propaganda for federal supervision has at least drawn a widespread attention to remediable defects in the present system.

I suggest a plan of campaign directed to the betterment of the present system. Let the leading insurance interests state their common and their peculiar grievances. Such a statement should gain the approval of the great body of insurants, whose real interests are prejudiced by many of the current regulations, and their support would advance the movement.

The statement should preface a scheme of insurance legislation to be submitted to Congress, for if Congress cannot lawfully supervise the bulk of the insurance business it can at least frame model regulations for the fraction within its jurisdiction, namely, the District of Columbia and all other federal territory. Such regulations, without imposing a rule for the States, should obtain a reputation of substantial value.

Federal standards of law could be adopted by any State without loss of dignity, and a central bureau of insurance should demonstrate its superiority over the various local bureaus.

A federal bureau could so exercise its powers as to leave the States without an excuse to duplicate important parts of its work. For example, when a foreign corporation had fulfilled strict requirements prescribed for admission to fed-

eral territory, what duplicate or additional guarantees of solvency and good faith could a State decently demand? When it had passed a rigid federal examination, how rarely could a State justify an investigation on its own account? In fine, a company holding a federal certificate ought to hold a passport to the States relieving it from many local requirements which now vex the course of business.

CARMAN F. RANDOLPH.